IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date: 20.04.2007

CORAM:

THE HON'BLE MR. JUSTICE P.JYOTHIMANI

Appeal Suit No.1296 of 1990

N.K.Subbarayan

... Appellant

Vs.

1. Chidambara Padayachi (Died)
2. Murugesan,
3. Venkatachalam
4. Ammini

R2 to R4 brought on record as LRs of the deceased sole respondent vide order of this Court dated 09.03.2007 made in C.M.P.No.15090 of 2002

... Respondents

PRAYER: First Appeal against the Judgment and decree of the Court of the Additional Subordinate Judge, Salem dated 30.11.1989. Passed in O.S.No.338/86.

For Appellant : Mr.T.Murugamanikkam
For Respondents : Mr.Kaithamalai Kumaran for Mr.A.K.Kumarasamy

J U D G M E N T

The defendant in the court below is the appellant in this First Appeal. The first respondent herein who died during the pendancy of the appeal and his legal representatives have been brought on record as respondents 2 to 4, has filed the suit in O.S.No.338 of 1986 against the appellant herein for recovery of an amount of Rs.31,750/- along with cost and interest at the rate of 9% per annum on the basis of a promissory note stated to have been executed by the defendant on 21.07.1983 having borrowed an amount of Rs.25,000/- from the plaintiff, promising to repay the amount on demand with interest at one rupee per hundred per month. Since no amount has been paid either towards the principle or interest, he has issued a legal notice on 15.07.1986 and in spite of it the defendant has failed to pay and therefore, the suit was filed.

2. The defence of the defendant as it is seen in the written statement is that the plaintiff and one Chidambara Padayachi, Natesa Padayachi and late Anantha Padayachi were the sons of Mukka Padayachi.

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Anantha Padayachi has left his son Mathavan and all of them have constituted a joint family carrying on money lending business. One of the brothers of the plaintiff, namely, Natesa Padayachi has filed a suit against the defendant and his sons in O.S.No.414 of 1985, on the basis of a mortgage deed executed in his favour. According to the defendant, the suit promissory note was executed as a renewal of earlier one towards interest under the said mortgage, subject matter of suit in O.S.No.415 of 1985 on the file of the Sub Court, Salem. Therefore, according to the defendant, the suit promissory note including other promissory notes were given to the plaintiff Chidambaram Padayachi and another. According to the defendant he has not received any amount as a consideration under the suit promissory note.

3. That apart it is also the defence that the interest claimed is usurious. The Trial Court has framed the issues as to whether the suit promissory note is supported by any consideration and also as to whether the interest claimed is usurious. The plaintiff was examined as P.W.1 and on the defendant's side apart from the defendant who was examined as D.W.1, there was another witness examined as D.W.2 to support the defence of the defendant. The suit promissory note was marked as Ex.A.1 apart from the legal notice issued and acknowledgement received by the defendant marked as Ex.A.2 and A.3. On the side of the defendant the mortgage deed executed by defendant and others in favour of Natesa Padayachi dated 16.05.1968 marked as Ex.B.1 and the plaint and written statement filed in O.S.No.414 of 1985 and 827 of 1986 were marked as Ex.B.2 to B.7 apart from another document Ex.B.8 which a returned cover. The defendant's side has also filed another Ex.B.9 dated 24.06.1985 which is a copy of the partition deed executed in the plaintiff's family. The learned Trial Judge on appreciation of evidence and considering the documents and having come to the conclusion that the defendant has not proved that Ex.A.1 promissory note was not supported by consideration and also stating that the interest claimed at the rate of 9% is not usurious, has decreed the suit as prayed for. It was as against the judgement and decree of the Trial Court the defendant has filed the present appeal.

4. The learned counsel for the appellant Mr.Murugamanickam, would contend that as per Ex.B.9 dated 24.06.1985 there was a partition in the plaintiff's family who have been carrying on money lending business and the said document specifically states that even after partition the money lending business shall continue. The suit promissory note was executed on 21.07.1983 before the partition and by virtue of the continuation of their money lending business as per Ex.B.9, it is contended by the learned counsel for the appellant that the plaintiff is deemed to have continued the money lending business. That apart he would submit that under Ex.B.1 which is a mortgage deed executed by the defendant along with others in favour of Natesa Padayachi who is admittedly one of the brothers of the plaintiff and in respect of that suits were filed the plaint and written statement of which have been marked as Ex.B2 to B7 and it was in respect of the interest amount due under the said mortgage document, the suit promissory note came to be issued to Natesa Padayachi and that has been

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used by the plaintiff for the purpose of recovery of money treating it as a promissory note. Therefore, according to the learned counsel for the appellant, the Trial Court has failed to consider the totality of the situation while granting decree in favour of the plaintiff.

5. On the other hand, the learned counsel for the respondents would submit that Ex.B.1 mortgage deed itself is of the year 1968 while the suit promissory note was executed 15 years thereafter namely, on 21.07.1983 and therefore, there is absolutely no relationship between Ex.B.1 and Ex.A.1 at all. That apart it is also his contention that the witnesses examined on the side of the defendant D.W.2 himself has admitted that he is the friend of the defendant and therefore, he has been procured only for the purpose of making a false defense and in view of the same, according to the learned counsel for the respondents, the Trial Court judgement is perfectly in order.

6. I have heard the learned counsel for the appellant as well as the respondents and perused the entire records.

7. In this appeal the point for determination is as to whether the judgement and decree of the Trial Court in passing decree in favour of the plaintiff is wrong which deserves to be interfered by this Court. At the out set it is clear that the defendant has admitted the execution of the suit promissory note Ex.A.1. Even a reading of the written statement filed by the defendant shows that the execution of the suit promissory note is not denied. The categoric terms in this regard in the written statement of the defendant are as follows:

> "This defendant has left three pronotes in favour of the plaintiff, Chidambara Padayachi and another in favour of Natesa Padayachi, brother of the plaintiff and the other one now stands in favour of Madhavan in renewal of the pronote, then stood in favour of Bagiyam."

8. But the defence is that even though he has executed the suit promissory note, he has not received any consideration for such execution and his version is that the suit promissory note was handed over in respect of the amount due to the plaintiff's brother Natesa Padayachi under mortgage deed executed by him along with others on 16.05.1968 marked as Ex.B.1, in respect of interest due there on. Therefore, as it is correctly found by the learned Trial Judge when once the defendant has admitted execution of Ex.A.1 the onus is heavily on the defendant to prove that for execution of the said Ex.A.1 he has not received any consideration as per Section 118 of the Negotiable Instruments Act. It is to substantiate his defense the defendant has produced the mortgage deed dated 16.05.1968 stated to have been executed by defendant and others in favour of Natesa Padayachi marked as Ex.B.1. When it is the case of the defendant that it was in continuation of the said mortgage deed dated 16.05.1968 and in respect of the interest due thereunder, he was made to execute the suit promissory note and that was handed over to the plaintiff

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at the direction of Natesa Padayachi, it is again for him to prove the fact with independent evidence.

9. When the defendant's case is that apart from the suit promissory note he has given two other promissory notes without receiving consideration from the plaintiff, as correctly found by the learned Trial Judge, it is not known as to why the plaintiff has not taken steps to examine any one of the witnesses who have signed in Ex.A.1 promissory note, to prove his contention that no consideration was passed on the date when Ex.A.1 promissory note was executed. As far as the documents filed on the side of the defendant Ex.B.2 to B.7 the defendant as D.W.1 has specifically admitted that in those suits plaintiff was not a party and it was the plaintiff's brothers who have filed the suit. It is relevant to point out that it is not even the case of the D.W.1 that his defense in those cases are similar to the same which are raised in this suit. Therefore, it is clear that the defendant has not proved to the satisfaction of the court the reason for relying upon Ex.B.2 to B.7. On the other hand, even assuming that there was a mortgage on 16.05.1968 in favour plaintiff's brother Natesa Padayachi, apart from the fact that the defendant has miserably failed to prove any relationship between Ex.B.1 and Ex.A.1 suit promissory note, on the face of it, it is not believable that there is any connection between these two documents since the difference is nearly 15 years between these two documents which are not properly explained and there were no evidence to connect the said documents. If we refer to the evidence of D.W.2 who is stated to be an independent witness and who had prepared Ex.A.1 promissory note, it is true that he has stated in the chief examination that the plaintiff has not given Rs.25,000/- to the defendant under Ex.A.1 promissory note. But it is not his case in the evidence that Ex.A.1 promissory note was given by the defendant in favour of the plaintiff in respect of same due under the mortgage deed executed by the defendant and others in favour of the plaintiff's brother Natesa Padayachi.

10. On the other hand, D.W.2 who says that he is in the habit of writing promissory note and other documents, specifically admits that he has not written any mortgage deed for the defendant by saying **"பிரதிவாதிக்கு குதவைப் பத்திரம் எதுவும் நான் எழுதவில்லை“ வாதி ”பிரதிவாதிக்கு கிரய ஒப்பந்தம் கிரயப்பத்திரங்கள் சுமார் 1 2 எழுதியிருப்பேன்".** It is also seen that in the cross examination the said D.W.2 has stated as follows:

"A1 புரோநோட்டில் வாதியிடம் பிரதிவாதி 21.7.1983 ஆம் தேதி ரொக்கம் 25,000 பெற்றுக்கொண்டு அதற்க்கு வட்டி ரூபாய் 1 வீதம் சேர்த்து தன்னுடைய குடும்ப வியாபார அவசர நிமித்தம் பெற்றுக்கொண்டு வாதிக்கு எழுதிக்கொடுத்ததுள்ளா ;"

This is the clear evidence of D.W.2 in the cross examination as recorded by the learned Trial Judge. Even assuming the contention of the learned counsel for the appellant is true that there has been a wrong recording of evidence since it should be treated as a denial, as the D.W.2 in the subsequent line has stated as follows:

"பிரதிவாதியிடம் லாபம் பெற்றுக்கொண்டு ரூ1 புரோநோட்டிற்க்கு தொகை கொடுக்கவில்லை என்று பொய் சொல்கிறேன்

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என்று சொன்னால் சரியல்ல",
that is not the case of the defendant at all especially in the circumstance that D.W.2 has not spoken in the line of the defense taken by the defendant at all. As I have stated earlier when it is the specific case of the defendant in the written statement as well as in his evidence as D.W.1 that he had to execute the suit promissory note and along with other two promissory notes in respect of the interest due under the mortgage deed Ex.B.1 to the plaintiff by the Natesa Padayachi and it was at his direction the suit promissory note was handed over to the plaintiff, D.W.2 who is stated to have been prepared Ex.A.1 has not spoken anything about that. This fact in addition to the non examining of any of the witnesses under Ex.A.1 clearly goes to show the defense raised by the defendants against Ex.A.1 is false and in any event the same as not been proved with any tangible evidence has found by the learned Trial Judge.

11. In such circumstances, the contention of the learned counsel for the appellant that Ex.B.9 partition deed dated 24.06.1985 entered in the family of plaintiff along with his brothers Natesa Padayachi and others shows that after dividing the properties, the brothers have accepted to continue money lending business is in no way helpful to the case of the defendants, for the simple reason that it all depends upon the defendant proving that he has not received consideration for execution of Ex.A.1 promissory note which he has miserably failed. In such circumstances even assuming that the plaintiff's family has been carrying on business in money lending, that will not itself be sufficient to throw out the veracity of Ex.A.1 promissory note.

12. In view of the above said categoric findings on fact on the basis of proper reasoning given by the learned Trial Judge I do not think that the judgement and decree of the Court below deserves to be interfered by this Court. In view of the same, the judgement and decree of the Trial Court passed in O.S.No.338 of 1986 dated 30.11.1989 is confirmed and the appeal stands dismissed with cost.

nbj

Sd/-
Asst.Registrar

/true copy/

Sub Asst.Registrar

To,
1. The Addl. Subordinate Judge, Salem.
2. The Section Officer, V.R.Section, High Court, Madras-104.
+1 cc to Mr.A.K.Kumarasamy, Advocate Sr.No.26683.
+1 cc to Mr.T.Murugamanikkam, Advocate Sr.No.26494.

BK(CO)
dcp/12.6.07

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